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In The

Supreme Court of the United States

October Term, 1992

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES,

Petitioner,

v.

CATHOLIC SOCIAL SERVICES, INC., ET AL.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

Petitioners,

v.

LEAGUE OF LATIN AMERICAN CITIZENS, ET AL.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. In a program designed to encourage those undocumented aliens who had long-resided in the U.S. to legalize their status, did Congress intend to preclude district court jurisdiction over statutory and constitutional class action challenges to invalid regulations that were used by INS to bar the filing of applications by large numbers of eligible undocumented aliens, thereby also, in violation of the statute, subjecting them to deportation and the inability to obtain employment authorization?

2. Did Congress preclude district courts from granting effective relief to parties illegally deemed ineligible to apply for legalization by INS regulations, policies and practices that thwarted the Congressional purpose of reallocating enforcement resources to the U.S. borders by maximizing the number of legalized aliens?

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EXPLANATION OF RECORD CITATION FORM

The following forms are used in this brief for citation to the record:

1. **Appendix to the Petition for Certiorari**: Citations to documents reprinted in the Appendix filed with the Petition for Certiorari are indicated by "PA".

2. **Joint Appendix**: Citations to the Joint Appendix are indicated by "JA".

3. **Clerk's Record in *Catholic Social Services v. Barr***: Citations to documents filed in the trial court in this case are indicated first by the designator "CRC" for "Clerk's Record--*CSS*", next by the docket number, and finally, by the page number within the specific document, when a specific page number is identified. Thus, a particular citation may be "CRC 27-17," indicating page 17 of the document identified in docket entry number 27 in *CSS*.

4. **Clerk's Record in *LULAC v. INS***: The same format as in citations to the Clerk's Record in *CSS* is followed, except the first designator is "CRL" for "Clerk's Record--*LULAC*".

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

INS' statement of the opinions below is erroneous in several respects. For the consolidated cases, the court of appeals opinion in both cases is reported at 956 F.2d 914, PA 1a-21a; and the partial stays are at PA 94a, 95a, 96a, and 97a-98a. In the first case (*CSS*): (1) there are two court of appeals opinions relating to the district court's TRO, JA 21-23, one at 820 F.2d 289 (1987), and one at JA 27-47; (2) the chief

opinion, and an order of the district court is at 685 F.Supp. 1149 (JA 54-77), and unreported orders granting further relief are at PA 22a-28a, 29a-33a, 40a-49a and CRC 61; (3) an unreported partial district court stay is at PA 34a-38a; (4) other related unreported orders are at JA 14-16 and 48a-51a (provisional and final class certification, respectively); and (5) a related opinion and order is at 664 F.Supp. 1378 (1987). In the second case: (1) the unreported district court opinion on the merits is at JA 211-34; (2) another unreported opinion and relief order is at PA 50a-60a.

STATEMENT OF THE CASE

A. Statutory Purpose and Structure of IRCA.

1. In 1986, Congress enacted the Immigration Reform and Control Act ("IRCA"), P.L. 99-603, 99 Stat. 3359. During its 15-year legislative evolution, Congress had grappled with the dilemma that millions of aliens had entered the U.S. illegally, with a multiplicity of both positive and negative effects, *see* H. R. Rep. No. 682(I), 99th Cong., 2d Sess. 51-56 (1986) ("H. R. Rep."), yet it was clear that "mass deportations would be both costly, ineffective, and inconsistent with our immigrant heritage." *Id.* 49. Indeed, both the magnitude of the undocumented population and the seeming intractability of the problem was in major part due to our own "past failures to enforce[] the immigration laws...." *Id.*[1] Moreover, Congress

[1] See also *Plyler v. Doe*, 457 U.S. 202, 218-19 (1982); 131 Cong. Rec. S11613 (daily ed. Sept. 17, 1985) ("We are not really doing much deporting of illegal undocumented persons who have U.S. citizen children ... We are not that kind of country." Remarks of Sen. Simpson, Senate floor manager of IRCA); Select Comm. On Imm. & Refugee Policy, Final Report, *U.S. Imm. Policy & the Nat. Int.*, (1981) at 13 ("[O]ur society has participated in the creation of the problem. Many undocumented/illegal migrants were induced to come to the [U.S.] by offers of work from U.S. employers who recruited and hired them under the protection of U.S. law"); Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law &*

recognized that "many who enter illegally do so for the best of motives--to seek a better life for themselves and their families ..." *Id.* As a result, they:

> have become a part of their communities. Many have strong family ties which include U.S. citizens and lawful residents....They have contributed to the [U.S.] in myriad ways, including providing their talents, labor and tax dollars. However, because of their...status, these people are afraid to seek help when their rights are violated, when they are victimized by criminals, employers, or landlords or when they become ill.

Id.[2]

The 15-year debate finally brought forth a twofold solution which forms the basic goals of IRCA. First, by increasing INS' enforcement capacity, particularly along the borders, and diminishing the magnetic attraction of U.S. employment by imposing sanctions on employers who hire undocumented workers, Congress sought to stem the tide of future illegal migration. 8 U.S.C. § 1324a(a), (e)-(f) (employer sanctions) (further citations are to Title 8, unless specified otherwise); H.R. Rep. 46-49, 56-62; P.L. 99-603, § 111, 100 Stat. 3359,

Policy, 28 U.C.L.A. L. Rev. 615, 639-72, 692-95 (1981) (analyzing 100-year U.S. history of active *de facto* and *de jure* promotion of immigration and lax enforcement of immigration laws); Scanlan, *Immigration Law and the Illusion of Numerical Control*, 36 U. Miami L. Rev. 819, 832 (1982) (failure of the government to control illegal immigration is due to demand for cheap labor, ethnic pressures, foreign policy and civil rights considerations, and cost concerns).

[2] See *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct. 888, 891 and nn. 4-5 (1991) (hereafter, "*McNary*"), reprinting the full Congressional statement of purpose, only part of which is quoted in the text above.

The Administration shared Congress' perspective: "We must recognize the fact that some people, having entered this country illegally a substantial number of years ago, have set down roots here and become productive members of American society. We have to deal realistically with people whose long-standing presence here has demonstrated an abiding commitment to this country as productive and law-abiding residents." Statement of Attorney General Meese, H.R. Rep. 105.

3381 (providing for "increased funding ... [to] enhance INS' enforcement activities"). Then, Congress offered amnesty, the means by which long-term undocumented residents, the "shadow population," *McNary* 891, would surface from their clandestine status thus "allow[ing them] to contribute openly to society and ... help prevent the[ir] exploitation ..." H. R. Rep. 49, 63-66; S. Rep, No. 99-132, 99th Cong., 1st Sess. 3-8, 15-16 (1985) ("S. Rep.").[3] Through amnesty, limited INS enforcement resources could be sharply shifted from the nation's interior and concentrated more effectively on the borders to stem "new flows of undocumented aliens ..." H. R. Rep. 49; see also, *id.* 63-66. A full and "generous" amnesty program was viewed as "essential" and "a necessary part of an effective enforcement program ..." H. R. Rep. 49.

2. Several IRCA provisions strongly reflect Congress' belief that success in reaching these goals rested largely on maximizing the number of legalized aliens. That result would minimize the remaining undocumented population, simultaneously diminishing the resulting social problems and maximizing INS' ability to refocus enforcement staff on the borders. In this context, Congress insisted that the legalization program "*be implemented in a liberal and generous fashion* as has been the historical pattern with other forms of administrative relief granted by Congress. *Such implementation is necessary to ensure the true resolution of the problem* and to ensure that the program will be a one-time only program." *Id.* at 72 (emph. added).[4] Obviously, restrictive interpretation and implementation would leave large numbers of long-term undocumented residents

3 The other part of the legalization program, with shorter durational residence requirements, was established for Special Agricultural Workers, or "SAWs"; the key SAW eligibility factor is employment in farm labor for 90 days between May 1, 1985 and May 1, 1986. See *McNary, supra,* 111 S.Ct. at 891; § 1160(a)(1)(B)(ii); 8 C.F.R. § 210.3(a).

4 This statement reiterated the "long-standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987) (citations omitted).

in our midst, perpetuating a myriad of social ills and continuing to mire INS in the Nation's interior. See *McNary* 891, n. 4; *Perales v. Thornburgh,* 967 F.2d 798, 812-13 (2d Cir. 1992), *cert. pet. pend.*, No. 92-___.

Congress was keenly aware that formidable hurdles stood in the way of a successful legalization program. Congress studied what went wrong in the "legalization programs in other countries [which] have usually produced a low rate of participation among eligible candidates." *Id.* 73.

First was ignorance. To counteract it, Congress directed the Attorney General to "broadly disseminate information respecting the benefits which aliens may receive [by legalization] and the requirements to obtain such [legalization]." § 1255a(i). This "extensive education and outreach program" was designed to counteract the "lack of understanding among the undocumented population." H. R. Rep. 73.[5] INS's erroneous dissemination of information that class members were ineligible to apply for legalization is an important factor in these cases, as it was in parallel litigation. See, *e.g., Perales v. Thornburgh, supra,* 967 F.2d at 801, 804, 813-14; *Zambrano v. INS,* ___ F.2d ___, Nos. 89-16014, 90-15274, 90-15298 (9th Cir., Aug. 19, 1992).

Second was fear. Congress realized that many aliens understandably would be loath to approach INS to apply for legalization, because, during their long years in the "shadows," it was the most feared part of officialdom.[6] So, Congress enlisted buffering groups, called "Qualified Designated Entities"

5 Both the House and the Senate versions of IRCA contained similar provisions. See Conf. Comm. Rpt., H.R. Rep. No. 99-1000, 99th Cong., 2d Sess. at 92-93, (1986). Significantly, however, the Senate version required only a three-month education and outreach period beginning on the effective date of the Act. *See* 131 Cong. Rec. S11763 (daily ed., Sept. 19, 1985). The Conferees' deletion of this limited period shows that Congress felt that public education throughout the program's life was critical.

6 In the legalization programs of other countries, this "distrust of authority" had combined with ignorance to produce low participation rates. H.R. Rep. 73.

(QDEs), whose past activities on behalf of the immigrant community meant that they could be trusted. INS was mandated to contract with, and fund the outreach and counseling activities of churches and social service agencies. QDEs provided preliminary eligibility screening for potentially eligible aliens whose fear of contact with INS would otherwise have discouraged them from filing applications. § 1255a(c)(1)-(3).[7] To further encourage the maximum number of aliens to file applications, Congress barred *all* governmental entities, including INS, from access to any legalization records, including QDE files. § 1255a(c)(3)-(5). A violation was subject to imprisonment up to 5 years or fines up to $10,000. *Id.*[8]

Another major defect in the legalization programs of other countries was their abbreviated application period. See Meissner, Papademetriou, & North, *Legalization of Undocumented Aliens: Lessons From Other Countries*, 1-2 (1986) (Argentina, 6 months, *id.* at 9; Venezuela, 4, *id.* at 11; and Canada, 2, *id.* at 13). So, Congress required a 12-month application period, allowing the most timorous a full year to learn about the requirements for legalization, overcome fear, and then apply. § 1255a(a)(1).

3. Aliens eligible for legalization were those who had "continuously" resided in unlawful status in the U.S. from a date prior to January 1, 1982, through November 6, 1986, the effective date of IRCA. § 1255a(a)(2)(A).[9] From IRCA's

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[7] See *McNary* 892. Eventually, INS contracted with 977 QDEs. 52 Fed. Reg. 44812-24 (1987); Osuna, *Amnesty in the Imm. Reform and Cont. Act of 1986; Policy Rationale and Lessons From Canada*, 3 Am. U. J. of Int. Law & Pol. 145, 176-77, 181-84, 188-91 (1988) (describing the role of QDEs and nature of INS' outreach program).

[8] This was done "to assure applicants that the legalization process is serious and not a ruse to invite undocumented aliens to come forward only to be snared by the INS." H.R. Rpt. 73.

[9] Recognizing that it was natural for some aliens to have left the U.S. for family emergencies, deaths, etc., Congress provided that "brief and casual trips abroad" should not be "considered to break a period of continuous residence" in the U.S. § 1255a(g)(2)(A). This allowed absences up to 45

effective date to the date of application, such aliens would also have to show "continuous physical presence" in the U.S. § 1255a(a)(3)(A).[10]

B. The Lower Court Litigation

1. Common Elements in the Two Cases. These two cases arose as challenges to INS regulations interpreting the statutory requirements of "continuous residence" (*LULAC*), and "continuous physical presence" (*CSS*). See nn. 9-10 *supra* for a discussion of the relevant statutory and regulatory provisions. These regulations extinguished the eligibility of aliens who left the U.S. during the two time periods, and reentered illegally. In both cases, the district courts sustained class action challenges to the offending regulations.[11]

In both cases INS acquiesced in the orders invalidating the offending regulations and granting relief to class members who managed to timely file applications despite INS's rejection policy. These invalidation orders were not issued until just eight days before the end of the one-year application period closed

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days at any one time but no more than 180 aggregate days. 8 C.F.R. 245a(c)(1)(i). It was the *illegal* reentry of undocumented aliens who engaged in this sort of travel that gave rise to the *LULAC* case. INS' regulations, 8 C.F.R. §§ 245a.1(c), 245a.2(b)(9), deemed illegal reentries using INS documents following brief absences to be "constructively" legal, thereby ending the alien's required period of continuous unlawful residence. Of course, since they were undocumented aliens, their reentries could not be other than illegal. *See infra* pp. 14-16.

[10] Similarly recognizing the need for occasional travel out of the U.S., Congress provided that "[a]n alien shall not be considered to have failed to have maintained continuous physical presence ... by virtue of brief, casual, and innocent absences" from the U.S. § 1255a(a)(3))(B). An INS regulation, 8 C.F.R. § 245a.1(g), that illegally required legalizable aliens to obtain prior travel permission from INS, under penalty of loss of the right to apply for legalization, gave rise to the *CSS* case.

[11] The cases were filed, separately, at different times in the eastern and central district courts of California. The Ninth Circuit consolidated them for decision after argument in *CSS*.

(*CSS*), and nine weeks thereafter (*LULAC*). *CSS v. Meese*, 685 F.Supp. 1149, 1160 (E.D. Cal. 1988); JA 54-74; JA 211, 224.[12]

In *CSS*, twofold relief was granted. First, for those few class members who had managed to submit applications prior to May 4, 1988, INS was to readjudicate the applications under the proper standard. PA 24a-25a. INS did not appeal this part of the relief order.

Both district courts issued orders briefly extending the application period for those class members whose applications were rejected over-the-counter because INS and QDE employees adhered to their illegal instructions and regulations, or who failed to file solely because of INS' outreach campaign which unlawfully informed them that their illegal reentries made them automatically ineligible for legalization. See *infra* at 14, 16. These are the only orders from which INS has appealed. While INS concedes that it enforced invalid regulations and policies throughout the application period, it now contends that Congress rendered the judiciary impotent to redress the resultant injury.

2. The CSS Case. To maximize the number of aliens legalized, Congress required "an extensive education and outreach program prior to the application period," H.R. Rep. 73, delaying the start of the application period for six months to allow the outreach and education campaign to achieve its maximum effect. § 1255a(a)(1)(A). Furthermore, Congress recognized that immediately upon IRCA's enactment, legalizable aliens required a stay of deportation to avoid their arrest and expulsion prior to filing applications, and a work permit because the other key part of IRCA, prohibiting employment of all aliens without express INS work authorization, became effective upon

[12] Issuance of the district courts' remedial orders were delayed for a number of reasons, including INS' defense (later abandoned) of the challenged regulations on their merits, an interlocutory appeal taken by the INS in *CSS*, wide ranging discovery INS insisted on taking (including depositions of class members and declarants throughout the country, and several INS motions to dismiss.

enactment of the measure. § 1324a(a); *McNary* 891 n. 2. To insure that no legalizable alien would be expelled, or forced to work for employers willing to violate the new employer sanctions law, Congress required in § 1255a(e)(1) that all apprehended aliens be given a stay of deportation and temporary work permits, even before they could file an application, if they "establish[ed] a *prima facie* case of eligibility" for legalization. *Id.*[13]

Initially, however, INS refused to issue interim stays and work permits to legalizable aliens. Because a large number of illegal expulsions were occurring daily, the *CSS* plaintiffs filed suit six days after the President sigr ed IRCA to compel issuance of instructions to implement § 1255a(e)(1). JA 1. Two hours before the November 14, 1986 TRO hearing, INS finally implemented the stay/work permit provision by sending telexes to all of its offices. JA 184-85. However, this telex contained a rule interpreting § 1255a(a)(3)(B) to mean that no post-November 6, 1986 absence from the U.S. by an undocumented alien could be considered "brief, casual and innocent" unless the otherwise-eligible alien had obtained prior INS permission to travel ("advance parole"). JA 186. This was the very policy that the Administration had unsuccessfully urged upon Congress.[14]

[13] Also, interim stays of deportation and work permits were to be provided to applicants when *prima facie* applications were submitted during the application period. § 1255a(e)(2); *McNary* 892.

[14] While the merits are not at issue in these appeals, it is important when analyzing the jurisdictional and remedial issues to understand that the dispute over the meaning of the statutory term, "brief, casual, and innocent absences" long preceded *CSS*. The history of this dispute reveals that the invalidated regulation was not a simple inadvertent, unintentional, or negligent error. The phrase had evolved as an interpretation of the suspension of deportation authority in § 1254(a)(1), based on *Rosenberg v. Flueti*, 374 U.S. 449 (1963), with both INS and the courts focusing on the purpose of the trip rather than the nature of the reentry. See, *CSS v. Meese*, *supra*, 684 F.Supp. at 1157-59. That interpretation was squarely rejected by this Court in *INS v. Phinpathya*, 464 U.S. 183 (1984), but then just as

From that moment, aliens who had not first consulted with INS and obtained advance parole before briefly departing the U.S., were turned away at both the INS and QDE thresholds, and were denied interim stays of deportation and work permits, because they were deemed "statutorily ineligible."[15] According to INS, such an alien "will *not* be granted employment authorization ... [and] shall be considered to have broken his period of continuous physical presence and thus will be *ineligible for legalization* ..." Legalization Wire No. 1 (11/14/86) (emph. added), JA 185-86. INS instructed its employees that aliens so deemed ineligible for legalization were to be "placed in deportation ... proceedings ..." JA 185.[16] Yet, until May,

squarely reinstated by Congress in IRCA, P.L. 99-603, Stat. 3359, 3439 § 315(b), amending 8 U.S.C. 1254(b).

When IRCA was still aborning in the House Judiciary Committee, the Attorney General vigorously opposed use of the term in both § 1255a(a)(3)(B) and § 1254(b), H.R. Rpt. 116 ("The bill should also specifically state that absences related to violation of the immigration laws would automatically interrupt the physical presence requirement, regardless of the period of absence"): *id.* 124 ("We recommend either deleting this provision or amending it to preclude the establishment of continuous presence...where the alien has engaged in activities contrary to the immigration laws"). What was urged (unsuccessfully) in its stead was authorization to implement the very policy invalidated by *CSS*.

15 CSS quickly amended its complaint to challenge the prior advance-parole travel requirement. On November 24, 1986, the district court issued a nationwide class TRO enjoining the offending regulation. JA 14-16, 23-24. INS appealed to the Ninth Circuit which promptly stayed the TRO. JA 31. On April 3, 1987, the Ninth Circuit reversed, Judge Hall dissenting. JA 27-41, 42-45. The *CSS* plaintiffs sought a rehearing. Because shortly thereafter, the November 14, 1986 telex was amended to move the beginning date of the advance parole requirement from November 6, 1986 to May 1, 1987, 52 Fed. Reg. 16208-09 (May 1, 1987)(8 C.F.R. 245a.1(g)), the Ninth Circuit vacated its prior opinion as moot and remanded the case to the district court. 820 F.2d 289 (9th Cir. 1987).

16 The fate of some illustrative plaintiffs was as follows:

Maria Noriega was apprehended at her Phoenix, Arizona home on November 24, 1987. In August, she had gone to Mexico, without advance parole, for three days to visit her parents. Instead of being allowed to apply

1987, when this policy was modified, the *only* way an alien could know of the policy was by reading the November 14, 1986 telex.[17] Under this unpublished policy, INS immediately

for legalization, she was "told she was not eligible...due to her reentry ...[Therefore,] ... Mrs. Noriega signed a form I-274 requesting a voluntary return to Mexico." JA 179-80.

Sofia Baez de Huerta, after a five-hour trip to Mexico for Mother's Day, testified that "[w]hen I went to see about my amnesty, they told [me] I was not acceptable, and they told me I could not appeal." JA 114.

Trinidad Morales visited an INS office after receiving a phone call from the agency that he should appear to collect a $1,000 bond posted earlier. When he appeared, he was arrested and ousted despite his eligibility for legalization. JA 118-120. He told INS that he "had enough proof" to establish eligibility, but "they were not interested in any such proof." JA 119.

When Doroteo Rodriguez Ibarra reported to INS at an office along the border, because he had an outstanding "voluntary departure" order, rather than being processed for legalization he was told: "Here is the door. Go Back to Mexico." JA 127.

Santiago Colin Feregrino was apprehended in October, 1987, and was told that he was ineligible for amnesty. JA 136. He was handed a "voluntary departure" form and INS "told me to sign ..." They told us if we signed the departure [form], it would not affect our cases ..." *Id.* 137.

Uvaldo Franco Solorio managed to get an application on file despite a forty-five minute departure in 1987. However, at his INS interview he was told that the result of his filing the application would be his "deportation." JA 144-45.

Juan Anselmo Torres-Rivas was deemed ineligible for legalization because of an absence after the enactment of IRCA and therefore, in March, 1987, "was taken to the U.S. Border patrol station in Laredo, Texas, made to sign a form, and *on the same day...INS then made me walk across the bridge into ... Mexico.*" JA 181 (emph. added).

Because there was "a great lack of consistency among different Legalization offices," CRC 133, Pl. Ex. XXX, some class members actually proferred and had accepted timely applications. However, these applications were routinely denied by the INS. See, *e.g.*, CRC 145, Pl. Ex. DDDD, ¶ 13; Exhibit FFFF, ¶ 11. After the application period closed and the district court issued its summary judgment in favor of the *CSS* class, INS agreed to "reprocess" all these denials.

17 5 U.S.C. §§ 552(a)(1)(D) and 553(b)-(c); see *Morton v. Ruiz*, 415 U.S. 199, 233-37(1974); *Anderson v. Butz*, 550 F.2d 459, 462-63 (9th Cir.

began the mass ouster of aliens that Congress had made eligible for legalization.

On May 1, 1987, five days before the commencement of the legalization application period, INS issued its legalization regulations. 52 Fed. Reg. 16205-16. For those who had not been ousted under the earlier policy, the regulation dealing with post-enactment absences, 8 C.F.R. § 245a.1(g), forgave absences between the date of enactment (November 6, 1986) and the effective date of the regulation, May 1, 1987, but continued the INS' requirement that no absence could be "brief, casual and innocent" unless accompanied by "advance parole" for absences on or after May 1, 1987. *Id.* Plaintiffs again amended their complaint to challenge the new regulation on statutory and constitutional grounds. CRC 62.

Following extensive discovery and several INS motions, plaintiffs moved for summary judgment on November 9, 1987. Finally, on April 22, 1988, only eight days before the application period closed, the district court issued a brief, partial summary judgment order invalidating the regulation and declaring that "brief, casual, and innocent" absences did not require prior INS approval.[18] CRC 161. While INS gave no

1977); *Aiken v. Obledo*, 442 F.Supp. 628, 647-55 (E.D. Cal. 1977). It is administrative lawmaking like this that prompted Congress to enact the publication requirements of the Freedom of Information and the Federal Register Acts. 1 Davis, Admin. Law Treatise, §6.09, pp. 392-94, 1st. ed., 1958 (discussing incident in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 412-14 (1935) that prompted these Acts).

18 INS' "theory [was that] absent INS permission, the alien's reentry after the absence was unlawful, and thus not 'innocent'." Pet. Bf. 6. In explaining the 20-year evolution in the courts and INS of the contrary theory, the district court explained:

> The logic of the proposition appears clear to this court, given that the question arose in a suspension of deportation context, *all* departures and re-entries were likely to *vel non* violate the immigration laws. Thus if the innocence aspect of the test referred solely to the propriety of departure or re-entry, it would *always* be resolved against the alien; however, as noted, the test was intended to relieve the alien of the application of the immigration law *strictissimi juris*.

685 F.Supp. at 1159 n.10; JA 72 n.10 (emph. added).

INS not only restricted "brief, casual, and innocent absences" to those with INS "advance parole," it further limited advance parole to situations like those with "an emergent need to see an ill [immediate] relative, or a death in the family ..." JA 79.

Moreover, as Raul Aroz, Legalization Director for the largest QDE in the country, explained:

> [r]ather than informing legalization applicants and potential applicants seeking 'advance parole' that the information they provided would be confidential (as part of their legalization application), they were administered "Miranda warnings" and advised that their statements would be used against them in future administrative and/or criminal proceedings. This policy discouraged applicants from seeking advance parole to depart the country. JA 151-52; *cf.* n. 8 *supra*.

19 This minimally inconvenienced INS since the SAW program had a longer application period, extending to November 30, 1986, and applications for both programs were administered by the same staff.

The district court in *CSS* also granted an alternative order -- not before this Court -- applicable only if the order allowing applications to be filed for a limited additional time was reversed; it provides that class members should not be deported and should be provided work authorization. Only now, having *never* raised the issue in the Petition for Certiorari, nor in the Ninth

publicity to the invalidation of the regulation (JA 150), including, apparently, no notice to its own offices or QDEs, even if it had, the remaining time to apply or reapply was far too short for the large number of rejected and discouraged aliens (described more fully *infra* at nn. 23, 25). This ruling was not appealed. On May 3, 1988, the district court filed an extensive opinion explaining the basis of its April 22 order. See 685 F.Supp. 1149; JA 54-74.

Because the offending regulation was not invalidated until just eight days before INS stopped accepting applications, on June 10, 1988, the district court granted the only effective relief at its disposal to remedy the injury to the subclass of rejected and discouraged aliens: it ordered INS to accept applications from these class members until November 30, 1987. PA 22a-28a.[19]

3. The *LULAC* Case. *LULAC* involved another travel regulation, a conceptual variant of that challenged in *CSS*. This regulation interpreted § 1255a(a)(2) (which requires continuous unlawful residence from before January 1, 1982 to November 6, 1986), to establish a non-individualized policy of automatically denying legalization to immigrants who briefly left the U.S. during the required period of continuous unlawful residence, and returned illegally using non-immigrant visas. See 8 C.F.R. §§ 245a.1(c), 245a.2(b)(8), 52 Fed. Reg. 16205, 16208, 16210 (May 1, 1987); JA 211-14. The rationale was that the use of "facially valid" documentation rendered the alien's reentry constructively lawful, and therefore severed the alien's required continuous *unlawful* residence in the U.S., even though the alien, if later apprehended, could never claim lawful entry to avoid swift ouster. JA 217-24.[20] This regulation clearly violated the eligibility criteria as mandated by Congress.[21] It

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Circuit, INS questions the propriety of that remedy. Pet. Bf. 9, 30-31 n. 31.

First, the issue cannot now be raised because it is not embraced by the plain text of the questions raised in, nor in the text of, the Petition for Certiorari. See S.Ct. Rules, Rule 14.1(a); Stern, Grossman and Shapiro, *Sup. Ct. Prac.*, §§ 6.26-27 (6th ed. 1986). Second, because INS failed to raise the issue in the Ninth Circuit, it has waived any right to raise it here. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); Stern, Grossman and Shapiro, *supra*, § 6.26. The Ninth Circuit did not address the appropriateness of this order. In any event, this part of the order is authorized by the traditionally broad remedial powers of a court of equity. See p. 44 *infra*. INS' suggestion that this relief is tantamount to granting legalization, is flatly wrong. INS ignores the key distinction between the sharply different status that class members would possess under the alternative relief order (aliens whose deportation is enjoined), versus their lawful permanent resident status gained through legalization, and eventual eligibility for citizenship. §§ 1255a(b)(1), 1427.

[20] As in *CSS*, *LULAC* class members were also denied temporary stays of deportation and work permits because INS deemed them ineligible for legalization.

[21] Under INS's regulation, *only* those aliens who returned from brief trips clandestinely *evading* INS inspection, were deemed not to have broken their

illegally eliminated tens of thousands of European, Asian, South American and African applicants from eligibility in the legalization program, tilting amnesty to nationals from Mexico and Central America -- those who more traditionally leave and return without inspection.

In July, 1987, LULAC filed suit. JA 5. On November 17, 1987, after defending the challenged regulation and just days before a preliminary injunction hearing, INS modified the regulation to eliminate the disqualifying nature of an illegal entry by means of facially valid INS documentation. See 8 C.F.R. § 245a.2(b)(9)-(10), 52 Fed. Reg. 43843, 43845 (Nov. 17, 1987). However, during the previous seven months, just like *CSS* class members, undocumented aliens who were disqualified by the invalidated regulation had their applications rejected, were denied interim stays/work permits, were ousted upon apprehension, and were informed by INS' outreach program that it was futile to apply.

Because plaintiffs and class members remained injured by the invalidated regulation, *LULAC* moved for summary judgment. On July 15, 1988, the district court ruled that pre-November 17, 1987 reentries into the U.S., after brief absences and returns improperly using INS documentation, did not sever continuous illegal residence. J. A. 211-34. As in *CSS*, INS did not appeal from this merits ruling. Relief in *LULAC* followed essentially the same pattern as that in *CSS*. Because the evidence overwhelmingly established that INS failed to publicize its November 1987 change in policy, and thousands of class members therefore never applied or reapplied before the May 4,

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unlawful residence in the U.S. INS' bizarre regulation ran directly counter to an unbroken line of cases in which the Attorney General, INS, the Board of Immigration Appeals, and the courts had held that an entry accomplished with a visa or other INS documentation is unlawful when the alien had made material misrepresentations in the visa application or at the time of his/her request for admission to the country. See, *e.g.*, *Brownell v. Carija*, 254 F.2d 78, 80 (D.C. Cir. 1957); *Matter of I.L.*, 7 I&N Dec. 233 (BIA 1956); *Matter of Martinez-Lopez*, 10 I&N Dec. 409 (Atty. Gen. 1964).

1988, deadline, the district court, on August 12, 1988, extended the application period for class members for a period less than four months, to November 30, 1988. App. 50a-60a.[22]

C. The Rejection of Applications and the Erroneous Outreach and Education Campaign by INS and QDEs Necessitated the Orders Granting Brief Extensions

The remedial problem that faced the district courts in both cases was caused by three interrelated factors: (1) INS and its QDEs refused to accept applications submitted by class members; (2) INS and its QDEs distributed erroneous information in the statutorily mandated educational outreach effort, thereby having the intended effect of deterring class members from trying to file applications; and (3) the judiciary's inability to resolve these cases in sufficient time before the twelve-month application period ended to provide class members a reasonable opportunity to file applications.

1. Many class members are aliens who were thwarted from even filing applications based on one or both of the two invalidated regulations. Indeed, this was compelled by INS' own required procedures. For example, reflecting the policy in the earlier telex (JA 185-86; see *supra* p. 11), the INS Legalization Manual, binding on both INS staff and its QDE agents, expressly stated that "[i]f there are major deficiencies in the application package *or if the applicant. ... is statutorily ineligible, the application will be rejected,*" JA 188 (emph. added), which meant that it was returned without processing. *Id.* This practice of rejecting applications is informally called "front desking," since it occurs at the front desk of an INS office. To get an application filed a "front desked" applicant

22 The district court concluded that by applying its invalid regulation from May until November 1987, the INS had "effectively designated a six-month [rather than a twelve-month] period for application" by those in the class. JA 56a.

would have to convince an INS or QDE clerk to ignore INS' regulation and written rejection policy.[23]

Moreover, the Cooperative Agreement between each QDE and INS required QDEs to comply with "all INS regulations relating to the legalization program." JA 150. As a result, logic as well as the record evidence in these cases, demonstrates that many eligible aliens were told by QDEs acting as INS' agents,[24] that they would not be permitted to file applications because they did not satisfy one or the other of the regulations invalidated in these cases. As Raul Aroz, the Legalization Director for Catholic Charities of Los Angeles, the largest QDE in the U.S. (having screened over 300,000 potential applicants) explained, until the *CSS* court's April 22, 1988 prohibition on enforcement of the advance parole regulation:

> QDEs, including Catholic Charities, recommended to many applicants that they not file legalization applications

23 The evidence overwhelmingly confirmed implementation of INS' written policy of rejecting applications proferred by class members. INS conceded in discovery that prior to October 8, 1987 it was its policy to reject applications proferred by *LULAC* class members. CRL 16, Ex. K at 144. In San Francisco, it was "the practice of [INS] to deny [*LULAC* class members] the right to file an application for legalization ..." JA at 200-01; see also CRL 16, Ex. P at 159. It was the same in other California cities: CRL 16, Ex. K at 144 (Oakland); CRL 16, Ex. L (San Diego); CRL 16, Ex. F (San Jose); JA at 204 (Chula Vista); and in Arizona, JA at 209. See also CRL 16, Ex. H at 135; CRL 59, Ex. GG at 2-3; CRL 16, Exs. C-Z; and CRL 16, Ex. O.

INS's suggestion that the challenges to the regulations are not yet ripe because they had not yet been applied, see discussion of *Lujan v. National Wildlife Fed.*, 110 S.Ct. 3177 (1990), Pet. Bf. 20, is surely answerable by INS' rejection of valid applications. It is the crucial denial of a temporary work permit and stay of deportation upon apprehension, or via "front desking" (the fate of each of those in the preceding paragraph), and the consequent loss of a lawful right to work and vulnerability to deportation that is the "concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." *Lujan*, 3190.

24 In *Ayuda v. Thornburgh*, 880 F.2d 1325, 1339 (D.C. Cir. 1989), INS conceded that QDEs are its agents.

because they were deemed statutorily ineligible by the INS ... Many *CSS v. Meese* class members, numbering in the hundreds or thousands, remain in the country but failed to file their legalization applications because they were advised by the INS, or a QDE under contract with the INS, that they did not qualify as a result of reentries after INS' various last-date-of-entry rules, and they did not want to waste the filing fees and costs associated with filing....To the best of my knowledge, the INS [had] not yet even notified the Local Legalization offices of the court's ruling, and the vast majority of QDEs, non-profits and class members remain unaware of the court order.

Many of the class members have departed the [U.S.] because they were led to believe that they were ineligible for legalization by the INS. Others were apprehended by the INS while attempting to return to the [U. S.] other than on advance parole and thereafter, while still in INS custody, signed "voluntary departure" forms ... because they were led to believe they had no right to remain in the U.S ...

JA 149-50; see also, JA 197-98 (declaration of Hon. G. Indelicato, Director of Catholic Charities of Los Angeles, and former INS Immigration Judge, to the same effect).

2. Second, the "extensive education and outreach program," designed to counteract the "lack of understanding among the undocumented population," and thereby "*encourage* participation," H. R. Rep. 73 (emph. added), produced just the opposite result.[25] While INS widely publicized its illegal

[25] INS announced on Spanish language TV that those who entered with nonimmigrant visas after 1982--i.e. *LULAC* class members--were "disqualif[ied]" from participation in the program. CRL 16, Ex. C at 110. In Hawaii, INS advised community agencies that class members should be "discouraged from filing legalization applications." CRL 16, Ex. R at 168. At "liaison" meetings held between INS and community representatives of legalization applicants, the INS "reiterated" its "reentry" regulation, "namely that aliens, who otherwise qualified for legalization, were deemed ineligible ... if they briefly departed the [U. S.] after January 1, 1982, and thereafter returned using non-immigrant visas." CRL 16, Ex. CC at 211. The QDEs in turn "advised potential applicants of INS's position in this regard." *Id.* JA 147 (Yanez did not file because he read several articles in which "INS officials were quoted as saying that people who left after May 1, 1987, were ineligible for amnesty." This was confirmed when he visited the offices of Catholic Charities, a QDE in Los Angeles); CRC 167, Ex. UUUU, ¶ 5 (same). See also CRC 167, Ex. TTTT (heard of ineligibility through INS media quotes, confirmed by a QDE); CRC 120, Ex. OOO, ¶ 10 (advised of ineligibility by QDE); CRC 120, Ex. PPP, ¶ 17 (same); CRC 115, Ex. YY, ¶ 12 (same); CRC 148, Ex. LLLL, ¶ 6 (same).

regulation, it was relatively silent on its November 1987 modification of the invalid regulation. Hon. G. Indelicato, a former INS Immigration Judge, and Director of the largest QDE in the U.S., said:

> [T]housands, if not tens of thousands, of potential applicants for legalization who qualify for the benefit do not know that INS has now changed its policy regarding reentries affected with non-immigrant visas during the required period of unlawful status ...To my knowledge, the INS has taken no steps to publicize this change in policy ...

JA 198.[26] INS conceded that at least 100,000 eligible aliens were effected by its decision to rescind the regulation challenged in *LULAC*. CRL 29 at 70 and 72. On December 3, 1987, pursuant to court order, INS filed an unsworn pleading describing in conclusory and vague terms its publicity regarding the change in policy. CRL 26. However, sworn responses to

[26] See also, testimony of experienced immigration attorneys: "I have seen no attempts by [INS] in the San Francisco Bay Area to inform the public of the change in policy ... so that they would know that they are now eligible to apply." JA 201; JA 205, 208, 210 (same). The same experience was suffered by the members of other deterred classes. See, *e.g.*, *Perales v. Thornburgh*, *supra*, 967 F.2d at 810.

plaintiffs' discovery requests disclosed that the change in policy was hardly publicized at all. CRL 29, Ex. K at 49-51, 55-60.[27]

3. Finally, even though the plaintiffs in these cases moved extraordinarily swiftly, the courts obviously could not reach final judgment in time to permit class members a reasonable opportunity to file their applications. Even though INS did not appeal the merits, these cases have taken several years to reach this Court and final judgment is still likely several months away. See *supra*, n.12.[28]

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[27] For example, INS was unable to produce a single Spanish or Asian newspaper article on the policy change. *Id.* In fact, unless class members could read (and afford) one of eight English newspapers, in just certain regions of the U.S.--the Wall Street Journal, New York Times, Washington Post, Los Angeles Times, Baltimore Sun, Washington Times, Miami Herald or Chicago Tribune--they may never have learned of the agency's change in policy. *Id.* 70-81. Community advocates and attorneys involved in the legalization program uniformly reported that no local publicity about the change in policy was generated by the INS. See *e.g.*, CRL 16 at 116, 119, 123, 138, 141, 144, 147, 159, 176, 178. INS TV and radio announcements, prepared after the change, were silent about the change in policy. CRL 29 at 104-07. However, according to an INS-sponsored survey, 49% of "potentially eligible undocumented aliens" did not apply for legalization because they "believe[d] themselves not to be eligible for the program." Cong. Rec. S5040 (daily ed., April 28, 1988).

[28] Pending appellate review, class members clearly required protection from deportation and forced unemployment. In *LULAC*, it was provided by stipulation, CRL 76, while in *CSS*, by a Ninth Circuit order. PA 97a. Approximately 300,000 putative class members have surrendered to the INS (protected by confidentiality provisions) and filed provisional applications under stipulated stay orders which still remain in effect. All have been given INS receipts for their applications, and 100,000 have been issued temporary stays of deportation and employment authorization. Reversal by this Court will return these class members to the unregulated "shadow underground." Under the present stay orders, their applications are confidential so deportation proceedings will not begin unless they are independently apprehended. Reverting hundreds of thousands of legalization-eligible aliens to undocumented status will completely thwart the dual Congressional objectives intended by enactment of amnesty and employer sanctions. See also Brief of Amicus Curiae of the Cities of Chicago, New York, Los Angeles and the District of Columbia filed in this case.

SUMMARY OF ARGUMENT

1. *McNary v. Haitian Ref. Cent., Inc.*, 111 S.Ct. 888 (1991) held that IRCA's specialized judicial review provision applied "*only* to review of denials of individuals ... applications," *id.*, 897 (emph. added), because it "seems plain ... that [so] restricting judicial review ... is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* 899. Precisely the same type of claims are in these two cases. Restriction to § 1255a(f) review, would have deprived class members of work authorization and stays of deportation, both crucial to survival in the U.S., *pending* resolution of their "generic" challenges, which would take years. Therefore, such review, "as a practical matter ... [is not] meaningful judicial review." *Id.* 989. Therefore, INS' substantive/procedures-practices distinction does not alter *McNary's* conclusions; moreover, the claims in these cases raise challenges to substantive regulations, as well as agency procedures and practices.

2. The facts of these cases amply undergird application of this Court's recent decision in *Irwin v. Veteran's Admin.*, 111 S.Ct. 453 (1991), supporting the presumption that Congress intended judicial power to equitably toll the application period, a result manifestly furthering IRCA's overall purposes. It has not been shown that Congress intended otherwise, nor can the earlier decision in *INS v. Pangilinan*, 486 U.S. 875 (1988), be read to rebut the presumption.

ARGUMENT

Both of the questions before the Court essentially require the discernment of Congressional intent. As to the first question, jurisdiction, that task was undertaken last year in *McNary*. With respect to the issue of remedy, the task is made easier by Congress' express direction that any doubts should be resolved in favor of an interpretation that maximizes the number of

eligible aliens whose status is thereby regularized -- Congress insisted that the Act "be implemented in a liberal and generous fashion" because "[s]uch implementation is necessary to ensure the true resolution of the problem and to ensure that the program will be a one-time only program." H. Rep. 72.[29] Yet, in the face of this Congressional directive, INS suggests a remarkable, dualistic interpretive paradox. First, IRCA *must* be interpreted to *prevent* the courts from granting effective relief from the implementation of INS' illegal regulations and widespread rejection of applications and dissemination of erroneous advice, with the immediate effect of excluding hundreds of thousands of aliens who were likely to be legalized, ultimately returning them to the "shadows," forcing them to turn to crime or find employers willing to violate the employer sanctions law in order to survive, and encouraging all of the social ills associated with a large undocumented population. This, INS, asserts will faithfully effectuate the will of Congress. *Cf.*, U.S. Constitution, Art. II, § 3. The second prong of this paradox is this: in INS' view the *only* judicial review available to the class members is through §1255a(f), which however is *not* available because class members did not receive "denials," since they did not file applications within the designated one-year period.[30]

Even though the nature and extent of how INS injured the classes did not completely become known until just before (*CSS*) or after (*LULAC*) the application period closed, INS' response is, "Well, that's your fault -- you should have applied

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29 The Legalization Appeals Unit has cited this directive in decisions designated as precedential by the Commissioner of INS. See, *e.g.*, *Matter of C-*, 19 I&N Dec. 808, 810 (Comm'r 1988); *Matter of N-*, 19 I&N Dec. 760, 762 (Comm'r 1988). See also n. 4 *supra*.

30 As we discuss below, class members would never have been able to appeal "denial[s]" of their applications as they never received "denial[s]" because their applications were rejected. Section 1255a(f)(3)(B) provides that judicial review of amnesty denials shall be determined on "the administrative record established at the time of the determination on the application ..." But because class members never received such a "determination" there is no "administrative record."

even though we would not accept your applications and we widely publicized your ineligibility." Surely, that is not the lesson in America's form of democratic governance that Congress wished to plant in the world community in this, the quincentenary of Columbus' voyage.

When Congress drafted IRCA, it is fair to conclude that it was assumed INS would promulgate regulations consistent with the statute. Here, INS admits that it violated the statute (by its failure to appeal the merits of these two cases), preventing hundreds of thousands of otherwise eligible aliens from seeking legalization, despite Congress's clear intention that they be legalized. This Court now faces the same question that was before it in *McNary*: what access to judicial review did Congress intend these injured aliens to have, with the added question of what remedies can courts craft to fulfill congressional intent: class-wide resolution at an early stage that permits temporary work authorization and stays of deportation, or return to the underground and futile administrative exhaustion and hundreds of thousands of individual cases clogging the administrative system and the courts of appeals for years?

I. JURISDICTION

A. *McNary v. Haitian Refugee Center*

INS' jurisdictional argument requires no more than a straightforward application of the decision in *McNary*, which broadly held (1) that Congress did not intend to divest the district courts of their traditional 28 U.S.C. § 1331 jurisdiction to hear *all* statutory and constitutional challenges to INS' policies and regulations (both statutory and constitutional claims are made in the two cases now before the Court),[31] and (2) that Congress intended IRCA's specialized review procedure to

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31 8 U.S.C. § 1329 provides a further basis for jurisdiction over "all causes ... arising under any of the provisions of" the subchapter of the INA in which IRCA is located.

apply *only* to individual challenges to those policies applied on a case-by-case basis. *McNary* stated:

> [W]e hold that [IRCA's specialized review provision] applies *only* to review of denials of individual ... applications. Because respondents' action does not seek review on the merits of a denial of a particular application, the District Court's general federal question jurisdiction under 28 U.S.C. §1331 to hear this action remains unimpaired ...

Id. at 897 (emph. added).[32]

McNary began by analyzing the plain language of § 1160(e)(1)-(3), the SAW version of § 1255a(f)(1), (3) and (4), which created a specialized judicial review procedure applicable, by its terms, only to claims challenging "a determination respecting an application for adjustment of status." *Id.* 896.[33] Adopting the lower courts' construction of this language. *McNary* stated:

> The critical words in [§1160(e)], however, describe the provision as referring *only* to review "of *a determination* respecting *an application*" ... Significantly, the reference to "a determination" describes a single act, rather than a group of decisions or a practice or procedure employed in making decisions.

Id. (emph. added). See also *Morales v. Yeutter*, 952 F.2d 954, 956-57 (7th Cir. 1991) (Posner, J.) ("[I]t is apparent from the language of the provision and ... the character of immigration

[32] *McNary* concluded that Congress did not intend to bar application of this Court's broader doctrine, rooted in the practical need for economizing scarce judicial resources, that distinguishes between broad constitutional or statutory challenges to an agency's policies, and narrow challenges to an agency's application to the facts of an individual case. See, *e.g.*, *UAW v. Brock*, 477 U.S. 274, 291 (1986); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 675 (1986).

[33] When *McNary* was before this Court, contrary to its current position, INS urged this Court to interpret the two jurisdictional provisions *identically*. *McNary*, Govt. Pet. for Cert. 28; see also *Ayuda v. Thornburgh*, No. 89-1018, Govt. Opp. to Cert. 16.

proceedings, and ... [*McNary*] held ... that the provision is limited to cases brought by [an alien] whose application ... is turned down").

In short, Congress intended that § 1160(e) review applies *only* to fact-finding or law-applying challenges to the "merits of a denial of a particular application," *id.* 897, "rather than ... general collateral challenges to unconstitutional practices and polices used by the agency in processing applications," *id.* 896, or "generic constitutional and statutory claims." *Id.* 899. At *no* point did the Court draw the distinction drawn by INS between a collateral challenge to INS' procedures, rather than the substantive standards under which INS evaluated applications. See Pet. Bf. 22-24.[34]

Moreover, the *CSS* and *LULAC* class members now before this Court did not seek a determination on any alien's discrete legalization application; none had received an INS "denial," which indeed is the essence of the problem in these cases. Rather, they challenged, on constitutional and statutory grounds, the two pertinent eligibility regulations that INS had instructed all of its staff, QDEs, and the Legalization Appeals Unit ("LAU") to follow in "rejecting" individual applications and erroneously advising individuals of their ineligibility.

Significantly, even in the situations where an alien who fell within either of the classes somehow filed an application, there could be no way to review the conformity of the regulations to the statutes. Congress could not have intended the exhaustion of futile administrative remedies. The LAU has no power to invalidate INS regulations on statutory or constitutional grounds. See *infra* at n. 41. Exhaustion of an administrative

[34] Putting aside the absence of a common sense, pragmatic need to revisit *McNary* while its ink is still drying (see *Hilton v. South Caro. Pub. Rys. Comm.*, 112 S.Ct. 560, 563-64 (1991); *Quill Corp. v. North Dakota*, 112 S.Ct. 1906, 1916 (1992)), INS' discovery of a "heart of the case" test lurking in the penumbras of *McNary* is unsupported in either the opinion's logic or its text, the text or legislative history of the statute, or even the analysis of the two *McNary* dissenters.

appeal in such a case therefore is clearly futile.[35] It must be emphasized that an alien challenging the legality of a particular regulation in that process could do so, with finality, only by challenging a deportation order issued years *after* rescission of employment authorization, a very daunting prospect that exacts a "price [that] is tantamount to a complete denial of judicial review ..." *McNary, supra,* at 898.

B. The *Ayuda II* Decision

INS asserts the reading of *McNary* adopted by *Ayuda v. Thornburgh,* 984 F.2d 742, 747-59 (D.C. Cir. 1991), *reh'g den.*, 958 F.2d 1089 (1992) (*en banc*) (*Ayuda II*). The *Ayuda II* majority ignored both the plain text of § 1255a(f) and this Court's common sense construction in *McNary*, and made no attempt to explain how the phrase "a determination respecting an application" by its terms supported a distinction between collateral and direct legal challenges. Instead, the majority simply concluded that this Court did not mean what it had plainly said in *McNary*. See *Ayuda II,* at 748-49 & n.5.

McNary concluded that INS could find no solace in the text of § 1160(e)(3)(B) (paralleling § 1255a(f)(3)(B)), limiting court of appeals' review "solely [to] the administrative record," and stating that "findings ... shall be conclusive [subject to] abuse of discretion," or when directly contradicted by "clear and convincing facts," because generic statutory and constitutional challenges do not fit within that model of review. Therefore, such challenges were not within Congress' contemplation of the scope of IRCA's narrow judicial review provision. *Id.* 896.

Ayuda II appears to ignore this conclusion. While conceding the premise, the *Ayuda II* majority claimed that Congress must have intended the § 1255a(f) "abuse of discretion" standard to be implicitly transformed into a "*de novo*

35 Moreover, the rejection of an application, as mandated by INS's Legalization manual (p. 17, *supra*), is not administratively reviewable. *Matter of Hernandez-Puente*, Interim Dec. 3153 (BIA 1991) ("[w]e have no jurisdiction ... to review or remedy a failure to act on [an] application").

standard" -- despite total textual silence -- whenever a plaintiff brought a legal rather than a factual claim. 948 F.2d at 748. But *McNary* expressly held otherwise, concluding that if Congress had intended § 1255a(f) to apply to legal challenges, it would have explicitly adopted a *de novo* standard of review. *McNary* 897. See also *Perales v. Thornburgh, supra*, 967 F.2d at 806-08.

C. Section 1255a(f)(2) Does Not Deprive the District Courts of Jurisdiction

Only one aspect of this case distinguishes it from *McNary*, but it is a distinction without a difference: the SAW judicial review provisions in § 1160(e) have no counterpart to § 1255a(f)(2) which precludes judicial review of the "denial of adjustment of status ... based on a late filing of an application..."

First, no class member received a "denial" and, as *McNary* held, the reference to "an application" relates only to "denials" of individual, completed applications, not to challenges to practices that thwarted the filing of applications. *Id.* 896; *Perales* at 807. Second, Congress' purpose in enacting this provision was to derail "efforts that will be made, on behalf of many persons *who are ineligible for the legalization program*, to delay the final determinations of their applications." S. Rpt. 48 (emph. added). The cases before the Court present precisely the *opposite* situation -- the aliens seeking relief are those likely to be *eligible*. As *Perales* emphasized, "[t]his action presents the question of whether *defendants* have circumvented a clear congressional purpose to provide a 12-month application to qualified applicants, not whether plaintiffs have done so." 967 F.2d at 807 (emph. in orig.). Finally, absolutely nothing in the text or the legislative history gives the slightest hint that "Congress intended, in § 1255a(f)(2), to insulate from judicial review INS regulations [or practices and policies, like rejection of applications] which ... have the effect of shortening or eliminating altogether the statutory application period." *Id.*

D. The Opportunity for Meaningful Judicial Review Under § 1255a(f)(2) Is Absent Under the Facts of These Cases

INS claims that here, in contrast to *McNary*, there is an opportunity for meaningful judicial review thus overcoming the traditional presumption favoring district court jurisdiction. Pet. Bf. 24-28. The argument is that a challenge to a regulation does not suffer by limitation to the administrative record, an assertion that ignores *McNary's* key conclusion that limiting judicial review of legalization denials to cases where aliens had to "voluntarily surrender themselves for deportation [is]...[q]uite obviously ... tantamount to a complete denial of judicial review for most undocumented aliens." *Id.* 898.[36]

McNary held that limiting generic constitutional and statutory challenges to § 1255a(f) review would create enormous practical hurdles. Nothing in INS' argument offers any reason to abandon that conclusion. To do so now requires concluding that Congress intended individual legalization claimants, as a condition to obtaining judicial review of a statutory or

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36 INS concludes this argument with the suggestion that deportation proceedings would naturally follow denial of an application. Pet. Bf. 13-14 ("In short, [respondents] could have awaited agency proceedings and challenged INS's regulations in deportation proceedings that *would have been brought against them* if they had been denied relief [by the LAU]" [emph. added]).

But there is no inexorable link between denial of legalization and deportation. Indeed, those who have resided in the "shadows" for 5, 10, 15, 20 years, have obviously shown keen evasion skills. Moreover, Congress created a Chinese Wall between INS legalization and enforcement staff, threatening the latter with severe criminal sanctions if they used information collected in the legalization process. §1255a(c)(5).

Finally, it appears that INS would not accept a surrender from an alien in this predicament. INS in *CSS* argued that an alien cannot surrender to the agency and thereby accomplish his or her apprehension. See CRC 40, at 42.

constitutional challenge to an INS legalization regulation or national practice:

1. To convince an INS or QDE clerk to ignore INS' rejection policy;

2. To make a necessarily futile (and costly) application for legalization;[37]

3. To appeal the resulting denial to a LAU that has no authority to consider the merits (and thus rule in the alien's favor) on a statutory or constitutional claim;[38]

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37 The cost of filing legalization applications ranged from $185 for an individual to $420 per family. 8 C.F.R. §103.7(b).

38 *McNary* 896-97 ("Because the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of those claims to the procedures set forth in [the specialized review provision] is not contemplated by the language of that provision"). Yet, inexplicably, INS persists in claiming that allowing district court class action challenges to regulations bypasses adjudication by the expert administrative agency. Pet. Bf. 21.

This argument is actually *stronger* here than in *McNary*, since the administrative process in *McNary* could have resulted in some individuals being granted legalization despite the procedural barriers that the INS imposed. As INS acknowledged in *McNary*, where the alien's challenge is to the INS' legalization *procedures* (rather than to a substantive eligibility guideline), the LAU might *still* grant legalization, notwithstanding the alleged violations. See Pet. Bf. in *McNary* at 18 n.14 (the LAU "could be urged to afford commensurate relief on statutory grounds, thus eliminating the need for judicial intervention....Alternatively, an alien might be found ineligible on grounds unrelated to the constitutional issue"). In the present cases, by contrast, *any* administrative review would be necessarily futile and unilluminating. But, the LAU has no authority to reject a regulatory interpretation of a statute. *Matter of Fede*, Interim Dec. 3106 at 2-3 (BIA 1989)("[a] regulation promulgated by the Attorney General has the force and effect of law as to this Board and immigration judges, and neither has any authority to consider challenges to regulations...any more than there is authority to consider constitutional challenges to the laws we administer.") See also, 8 C.F.R. §103.3(a)(3)(iii).

4. To waive the statutory right to confidentiality by convincing INS to accept a voluntarily surrender,[39] or wait however long to be apprehended by the INS for initiation of deportation proceedings (which the INS in its discretion could choose *not* to initiate -- thus precluding judicial review altogether);[40]

5. To be issued an order of deportation by an Immigration Judge and then file a futile appeal to INS' Board of Immigration Appeals;[41]

6. To file a petition for review in a court of appeals that has not had the benefit of prior district court consideration of these statutory or constitutional issues;[42] and

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39 §§ 1252, 1255a(c)(4), (5); n. 36, *supra* (INS would not necessarily accept voluntary surrender); see also S. Rep. 47 (QDE confidentiality provision encourages aliens to come forward "without fearing that their applications would be forwarded to the INS...."); H.R. Rep. 73.

40 See *McNary* 898 (aliens cannot obtain any review unless they "voluntarily surrender themselves for deportation. Quite obviously, that price is tantamount to a complete denial of judicial review for most undocumented aliens"); *Matter of Merced*, 14 I & N Dec. 644 (BIA 1974), *aff'd mem.* 514 F.2d 1070 (5th Cir. 1975); *Lopez-Tellez v. INS*, 564 F.2d 1302 (9th Cir. 1977).

41 The Immigration Judges and Board of Immigration Appeals have: (1) no authority to review a denial of a legalization application, § 1255a(f)(3), 8 C.F.R. §§ 3.1(b), 103.1(f)(2)(xxvii), 103.3(a)(2)(iii) ("No further administrative appeal shall lie from this decision, nor may the application be filed or reopened before an immigration judge or the Board of Immigration Appeals during exclusion or deportation proceedings"); (2) no authority to consider a late application, § 1255a(f)(2); (3) no authority to consider an equitable tolling claim involving INS' rejection of an application, *Matter of Hernandez-Puente*, *supra*, at 27; and (4) no authority to consider statutory and constitutional challenges to the Attorney General's regulations. See n. 38, *supra*.

42 See *McNary* 898-99 (under the government's approach, the courts of appeal "would also lack the fact-finding and record-developing capabilities of a federal district court. . . . [S]tatutes that provide for only a single level of judicial review in the courts of appeals 'are traditionally viewed as warranted only in circumstances where district court fact-finding would unnecessarily duplicate an adequate administrative record -- circumstances that are not present in "pattern and practice" cases where district court fact-finding is essential'").

7. To be deprived for years of "employment authorization," and thus suffer the severe hardship of having no legal right to work in this country, throughout this entire lengthy period.[43]

McNary concluded that "[i]t seems plain to us ... that restricting generic challenges is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* 899; see also, Kanstroom, *Judicial Review of Amnesty Denials: Must Aliens Bet Their Lives to Get Into Court?* 25 Harv. C.R.C.L.L.Rev. 53 (1990). The key question then is not whether the challenges are "direct" or "collateral," but whether, as *McNary* directs, they assert a generic constitutional or statutory claim, as indeed they do.

Finally, even accepting INS' direct/collateral distinction, the present cases fall on the "collateral" side of the line. In neither of these cases did plaintiffs request, nor receive, legalization. Rather, the relief sought and obtained only assured statutorily correct consideration of their applications *by INS*. As this Court stated in a similar context in *UAW v. Brock*, *supra*, 477 U.S. at 477, that a grant, or denial, of legalization might eventually result from these cases is irrelevant.

In short, it is hard to believe that Congress intended mandatory administrative exhaustion of claims whose resolution

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43 See *McNary* 892 ("the mere filing of a 'non-frivolous application' entitled the alien to a work authorization that would remain valid during the entire period that the application was being processed"; *id.* 895: "the denial of [legalized] status places the alien in an even worse position than he or she was in before the Reform Act was passed because lawful employment opportunities are no longer available to such persons"; see also § 1255a(e)(2)(B) (providing employment authorization to any alien who could establish a "prima facie" case of legalization eligibility); § 1255a(e)(1)(B) (providing employment authorization to "an alien who is apprehended before the beginning of the application period . . . and who can establish a non-frivolous case of eligibility to have his status adjusted ... (but for the fact that he may not apply for such adjustment until the beginning of such period) ...").

would not be furthered thereby. See n. 41, *supra*. And, INS' analysis completely ignores the substantial burden on immigration judges and the courts of appeal if each of the hundreds of thousands of class members in these cases were ordered deported and then raised these issues in individual appeals under § 1105a. *McNary* 898-99.[44]

E. The Congressional Incorporation of 8 U.S.C. § 1105a into § 1255a(f) Shows That District Court Review of Systemic Practices and Regulations Is Appropriate

By its terms, § 1255a(f)(4)(A) incorporates § 1105a, which governs direct appellate review of INS deportation orders, into IRCA's specialized review provision. Section 1105a has been

44 Had Congress intended § 1255a(f)(1) to be more broadly inclusive, statutory language to express such an intent was readily at hand. For example, *McNary* emphasized that Congress could have modeled § 1255a(f) on the more expansive language of § 1329 -- the general grant of district court jurisdiction under Title II of the INA --by channeling into specialized review "all causes...arising under any of the provisions of [the legalization program]." *Id.* 897. Similarly, Congress could have modeled § 1255a(f) on 38 U.S.C. § 211(a), which governs review of veterans' benefits claims, by broadly referring to "[review] on any question of law or fact under [the legalization program]." Or Congress could have adopted the Senate's original version of this language, which broadly referred to "review (by class action or otherwise) of a decision or determination under this section." But Congress chose none of these broader options -- thus its choice of the narrower language was surely intentional.

Indeed, the Senate's broad proposed language was expressly *rejected* in Conference (see S.Rep. 48) in favor of the more limited House bill, which differed from the Senate version in three principal respects: 1) it did not include the broad reference to "decision" or determination; 2) it did not include an express ban on class actions; and 3) it did not refer to "this section" or to the provision in that section of the Senate bill for Attorney General rule making. Indeed, in the final version of IRCA, the Attorney General's legalization program rule making authority (§1255a(g)) is not even mentioned until *after* the specialized review provision (§1255a(f)), thus further indicating that rule making was *not* subject to that review provision.

consistently interpreted, by this Court and others, to permit independent district court review of legal challenges to INS regulations and policies, even when application of those policies could ultimately result in a deportation order.[45]

This construction of § 1105a must be deemed to have been incorporated into IRCA, *Lindahl v. Office of Per. Mgmt.*, 470 U.S. 768, 782 n.15 (1985), which shows Congress did *not* intend generic challenges to policies and regulations, which exist separate and apart from any specific individual adjudication, to be cabined by § 1255a(f). The machinery of § 1105a (and its uniform body of case law) informs the meaning of "a determination respecting an application" in §1255a(f)(3).

For the *LULAC* class members there would never have been judicial review had the district court not assumed jurisdiction. None of the *LULAC* plaintiffs and class members protected from deportation and permitted to work by the court's order would ever have been able to appeal "denial[s]" of their applications through the procedures set forth in § 1255a(f), they never received "denial[s]." The illegal regulation, coupled with its "rejection" policy and erroneous education program, meant

45 See, *e.g., El Rescate Legal Servs., Inc. v. Executive Office of Immigration Review*, 941 F.2d 950, 953 (9th Cir. 1991); *Campos v. Nail*, 940 F.2d 495 (9th Cir. 1991); *Montes v. Thornburgh*, 919 F.2d 531, 535-39 (9th Cir. 1990); *National Center for Immigrants' Rights, Inc. v. INS*, 743 F.2d 1365, 1368-69 (9th Cir. 1984), *vac. on other grounds*, 481 U.S. 1009 (1987), *reaff'd on remand*, 913 F.2d 1350, 1352 (9th Cir. 1990), *rev. on other grounds*, 112 S.Ct. 551 (1991); *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1033 (5th Cir. 1982); *Jean v. Nelson*, 727 F.2d 957, 979-81 (11th Cir. 1984); *Salehi v. District Director*, 796 F.2d 1286, 1290 (10th Cir. 1986); *Orantes-Hernandez v. Smith*, 541 F.Supp. 351, 364 (C.D. Cal. 1982); *Hotel & Restaurant Employees Union v. Smith*, 563 F.Supp. 157, 162 (D.D.C. 1983), *summary judgment granted for defendant*, 594 F.Supp. 502 (D.D.C. 1984), *aff'd by an equally divided court*, 846 F.2d 1499 (D.C. Cir. 1988); *Abdelhamid v. Ilchert*, 774 F.2d 1447, 1450 (9th Cir. 1985); see also *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 (1968) ("In situations to which the provisions of §106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court").

that thousands of class members never even got applications on file. Judicial review of denials are reviewed on "the administrative record established at the time of the determination on the application ..." § 1255a(f)(3)(B). But here, class members *never* were allowed to receive a "determination on the[ir] application[s] ..." So, there is no "administrative record" to review. Accord *Perales*, 807.

District court jurisdiction also provided class members with protection from illegal arrest and deportation. As mentioned above, because INS *deemed them ineligible* for amnesty, it therefore considered class members equally ineligible for the mandatory statutory protections of stays of deportation and temporary employment authorization. 8 U.S.C. §§ 1255a(e)(1), 1255a(e)(2).

II. THE DISTRICT COURTS HAVE THE AUTHORITY, AND THE DUTY, TO CRAFT A REMEDY IN ORDER TO FULFILL THE INTENT OF CONGRESS

This Court recently said that in the federal courts:

> equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful construction.

Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1986) (citations omitted).[46] This principle should not be abandoned.[47]

[46] See also *Bowen v. Michigan Acad. of Fam. Physicians*, 476 U.S. 667, 681 (1986) ("Congress intends the executive to obey its statutory commands and...expects the courts to grant relief when an executive agency violates such a command"); *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1, 15 (1971) ("Once a right and violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth

A. This Court's Equitable Tolling Doctrine Supports the District Courts' Remedial Orders

Affirmance of the district courts' remedial orders requires only a rather simple application of the principles of the line of cases culminating in *Bowen v. City of New York*, 476 U.S. 467 (1986), and *Irwin v. Veterans Admin.*, 111 S.Ct. 453 (1991).

Irwin was a Title VII case which had been filed beyond the 30-day filing period. The lower courts rejected the claim, reasoning that the period was jurisdictional, comparable in effect to INS' contention here. The Chief Justice's opinion frankly notes that "our previous cases dealing with the effect of time limits in suits against the Government have not been entirely consistent, even though the cases may be distinguished on their facts." *Id.* 456. The Court went on to emphasize that:

> to decide each case on an *ad hoc* basis, as we appear to have done in the past, would have the disadvantage of continuing unpredictability without the corresponding advantage of greater fidelity to the intent of Congress. *We think that this case affords us the opportunity to*

and flexibility are inherent in equitable remedies"). Finally, the APA, 5 U.S.C. §706(1), requires a court to "compel agency action unlawfully withheld or unreasonably delayed." See *Lyng v. Payne*, 476 U.S. 935, 937-38 (1986).

[47] Constructive filing is another basis for remedying the harm caused by INS, and there are at least two bases to conclude that class members constructively filed applications prior to May 4, 1988. See *In re Thornburgh*, 869 F.2d 1503, 1516 (D.C. Cir. 1989). First, a large number of the class members actually tried to file applications with INS or its QDE agents. The remainder of the class, those who were effectively discouraged by INS's greatest "success" in its outreach and education campaign, should be protected by the well-settled rule that the certification of a federal class action brings the *entire* class before the court. *American Pipe & Const. v. Utah*, 414 U.S. 538, 550-52 (1974). Their complaints in these cases should be considered a constructive filing because the actions of INS thwarted them from filing administratively.

adopt a more general rule to govern the applicability of equitable tolling in suits against the government.

Id. 457 (emph. added).

Irwin adopted a rebuttable presumption in favor of the availability of equitable tolling, like that applicable in "suits between private litigants [which are] customarily subject to 'equitable tolling ...'" *Id.* 457 (citation omitted). An examination of Congressional intent serves as the source of rebuttal, if any.[48]

The strength of the presumption is illustrated by the comparison in *Irwin*, at 457, between the Title VII language at issue there (" 'within thirty days...an employee...may file a civil action'"), contrasted with the operative language in *Soriano v. United States*, 352 U.S. 270 (1957) ("'every claim...shall be barred unless the petition ... is filed ... within six years'"), the case that *Irwin* essentially overruled. After comparing the two statutes, *Irwin* said: "An argument can undoubtedly be made that the latter language is more stringent than the former, but we are not persuaded that the difference between them is enough to manifest a different congressional intent with respect to the availability of equitable tolling." *Id.* at 457. A fair comparison of § 1255a(f)(2), with that analyzed in both *Irwin* and *Soriano*, reveals that it is no more stringent than either one. Indeed, the language of the statute in *Soriano* seems far more stringent.[49]

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48 This Court has long held that "equitable [tolling] is read into every federal statute of limitation" regarding private defendants. See, *e.g.*, *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946). While the Government contended that so extending the presumption raises sovereign immunity concerns, *Irwin* said that where there is a waiver, such as in the APA application of the private-suit tolling presumption to government suits "amounts to little, if any, broadening of the ... waiver." 111 S. Ct. at 457.

49 Affirming the correctness of the presumption in *Irwin*, Senator Grassley, a leading opponent of a 1988 bill introduced to extend the amnesty application period, said: "the proponents [of an across-the-board extension] argue that certain court decisions recently handed down make some 75,000 persons eligible for the legalization program. *There may very well be equitable reasons to allow these individuals to apply; but there is no doubt that the courts are well-equipped to evaluate [such] equitable considerations.* The Senate need not enact a broad extension to accomodate certain litigants." Cong. Rec. S5041 (April 28, 1988) (emph. added). Immediately after Senator Grassley spoke, Senator Alan Simpson, the primary author and floor manager of IRCA, spoke. He expressed *no* disagreement with Senator Grassley's comments, and expressed his view that eligible aliens had a full "nine innings" to apply, "the ballgame has not been shortened." *Id.* S5040. The class members before this Court did not have a "nine inning" ballgame. They were generally not even admitted to the ballpark.

50 See also *Bowen v. City of N.Y.*, 476 U.S. 467, 479-80 (1986) (same); *Gaus v. Brooklyn East. Dist. Term.*, 359 U.S. 231, 234-35 (1959) (same); *Zipes v. Trans World Airlines*, 445 U.S. 385, 393 (1982) (tolling not limited to "statutes of limitations"). See further discussion *infra* at 59.

51 INS itself has recognized this in several other situations in which the agency has, for equitable reasons, extended the formal application period. The INS extended the application period for those "who applied unsuccessfully for registry prior to May 4, 1988 ... The date of application for legalization will be the date that the applicant applied for registry ..."; "registry" is an entirely different statutory benefit. CRL 65, Ex. 1. INS also deems applications timely filed if submitted to a QDE, even though the QDE failed to timely file the application with the INS. *Legal Opinion: § 245A Legalization Applications Filed Timely with QDE But Late Filed with INS* (Feb. 2, 1989), published in 67 Int. Releases 44-45 (Jan. 8, 1989). Finally, the agency has extended the deadline for applicants deterred from filing within the 30-day period provided for people in deportation

INS contends that equitable tolling is inapplicable because: (1) the 12-month IRCA application period is substantive, not procedural, like a statute of limitations, (2) INS did not engage in affirmative misconduct in this case, and (3) plaintiffs neither actively pursued their judicial remedies nor was their inaction induced by INS' conduct, Pet. Bf. 33-35, contentions that are flatly contradicted by both the facts and this Court's tolling jurisprudence.

First, "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural' but whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe & Const. Co. v Utah*, 414 U.S. 538, 557-58 (1974).[50] Tolling here is not only consonant with Congress' intent, it is the only way to fulfill the basic purposes of IRCA. See further discussion *infra* at 45-46.[51]

Second, "affirmative misconduct" on the part of INS is unnecessary, though the record abounds with such evidence. Judge Posner, relying on this Court's cases, explained last year, that equitable tolling -- as opposed to estoppel -- "does not assume a wrongful -- or any -- effort by the defendant" to prevent the plaintiff from acting.[52] While *Irwin* noted that a particularly apt case for equitable tolling is one, as here, "where the claimant has actively pursued his judicial remedies ... *or* where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass," *id.* 458 (emph. added), the "or" was not inadvertent, as the cases in the preceding footnote make clear.

Misconduct, while unnecessary, ought to bear on the question of the balance of the equities. *Bowen v. City of New York*, 476 U.S. 467 (1986) is poignantly instructive. A Social

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hearings. § 1255a(a)(1)(B); *Matter of* ---, (Northern Reg. Proc. Cntr. June 27, 1988) (Am. Immig. Lawyers Assoc. reprint no. LO988-347) (late application accepted because applicant turned away when attempted to file); *Matter of* ---, (Northern Reg. Proc. Cntr. March 14, 1988) (Am. Immig. Lawyers Assoc. reprint no. LO688-189) (same). However, in these cases, INS remains adamant that class members were initially ineligible under illegal regulations and now remain ineligible solely because the time to file has closed.

52 *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1991), citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (time bar tolled if despite all due diligence one is unable to obtain vital information bearing on a claim), which is based on *Bailey v. Glover*, 88 U.S. 636, 638, 21 Wall. 342, 348 (1875). Accord *American Pipe & Const. Co. v. Utah, supra*, 414 U.S. at 557-58; *Honda v. Clark*, 386 U.S. 484, 486, 501 (1967).

INS appears to mix concerns that arise under estoppel with those of tolling. *Lyng v. Payne*, 476 U.S. 935, 936 (1986) (emph. added), rejected a similar argument by the USDA:

> that any remedy that can be analogized to an equitable estoppel is necessarily invalid...unless the plaintiff succeeds in proving all the elements of common-law estoppel. *Cf. Honda v. Clark*, 386 U.S. 484, 494-945. *Indeed, any other rule has the potential for divesting the courts of the remedial authority specifically envisioned by Congress under the APA.*"

Id. (Emph. added).

Security applicant class sought benefits in plain contravention of the 60-day appeal period, which was nonetheless tolled because "the Government's secretive conduct...prevent[ed] plaintiffs from knowing of a violation of rights, [and] statutes of limitations have been tolled until such time...[to allow for] a reasonable opportunity to learn the facts ..." *Id.* 481. The analogous point here is that INS' practices also violated IRCA; what is different here than in most tolling cases is that INS' practices also violated INS' *affirmative* statutory obligations to engage in an "extensive education and outreach" program that conveyed accurate information. H. Rep. 73. See also § 1255a(i) (Attorney General must "broadly disseminate information respecting the benefits which aliens may receive and the requirements to obtain [legalization]").

Third, how much more diligence can be asked? *CSS* was filed six days after IRCA became law; the *LULAC* plaintiffs sued within two months after the operative regulation was adopted. JA 5. Moreover, untold numbers actively pursued their administrative remedies, attempting to file applications until "front desked," or seeking assistance from INS' agents, the QDEs, until informed they did not qualify. See evidence discussed at nn. 18, 20, 25 and 27, *supra*. INS argues that "Respondents plainly did not 'actively pursu[e] their remedies'; if they had filed timely applications, the matter would not have reached this Court." Pet. Bf. 33. That may be true, *if INS or the QDEs had accepted the applications*. Instead, it rejected them and informed class members they were ineligible. That should be enough; class members could do no more than file these lawsuits.

INS should not be heard to insist on strict compliance with a largely procedural provision of a statute, when its application would preclude any meaningful remedy for its unlawful failure to comply with other clearly substantive provisions of that same statute. Such a "one-way ratchet" is fundamentally unfair, is contrary to the *Bowen* doctrine, and would contravene the fundamental purposes of IRCA.

Application of the *Bowen* test that a court should be guided by "*overall* congressional purpose" of the legislation, *id.* 480 (emph. added), *necessarily* means that the time limitation is to be subordinated to assure that the "overall congressional purpose" will be served. In short, it is a conclusion that Congress, if faced with the specific set of equities, would have intended such an outcome. For that reason, the doctrine is a presumption read into every statute. See *supra* at 36. The basic question is if tolling would be "consistent with the *overall* congressional purpose." *Id.* 480 (emph. added). Here, such consistency is manifest in the lower court orders since IRCA's basic purpose is clearly to maximize the number of legalizable aliens so that future enforcement activities can be focused on the borders, which can be accomplished only by ensuring a *full* twelve months to apply, preceded by an *accurate* education program, during which undocumented aliens would get *correct* advice and be encouraged to come "out of the shadows" and apply. (See further, *supra*, pp. 3-4).

INS nevertheless argues that because IRCA contains "an express preclusion of judicial or administrative review of denials based on a failure to file in time, [*Bowen*] does not justify the relief affirmed by the court of appeals." Pet. Bf. 33. However, that preclusion has no bearing here since class members, by definition, have received no "denials." INS simply "rejected" their applications, thereby thwarting the opportunity to receive denials, and stays of deportation and work permits.[53]

53 Interestingly, class members who did receive "denials" because they somehow convinced INS to accept their applications need no further judicial remedies since INS has agreed to reprocess their applications under the proper standards. INS's outreach program both attempted to encourage those who were eligible to come forward and apply, and discourage those who were ineligible from applying. Those class members who actually tried to file applications represent failures in INS's outreach education program. Those who learned of their "ineligibility" through INS's outreach campaign, and concluded that it was futile to file an application, represent the successes and effectiveness of INS's outreach program.

INS also argues that equitable tolling applies only when "the challenged policy was 'a secret, internal policy,' rather than a published regulation." Pet. Bf. 33, quoting *Pittston Coal Group v. Sebben*, 488 U.S. 105, 123 (1988). First, neither *Bowen* nor *Pittston Coal* indicate that secrecy is a necessary element for the application of equitable tolling.[54] Second, both the individual harm, and the frustration of Congressional will, are identical under a "secret, internal" policy, or the equally internal INS "rejection" policy. In fact, the "advance parole" policy was "internal and secret" from the effective date of enactment, November 6, 1986, to May 1, 1987, when INS issued its legalization regulations, and the pol cy to "reject" applications was throughout a "secret, internal policy" set forth only in an agency manual, rather than published, as required under the APA, in the Federal Register.

Finally, INS' adoption of an unpublished policy of rejecting class members' applications, plainly resulted in class members being "induced ... into allowing the filing deadline to pass." Nothing in IRCA's text or legislative history indicates that Congress intended to exclude aliens who did not file timely applications solely because INS illegally deemed them to be ineligible and the rejected their applications or convinced them not to apply.

Bowen stressed that the Social Security Act is "'unusually protective' of claimants." *Id.* 480 (citation omitted). The same can be said of IRCA given Congress' insistence that the law be construed "in a liberal and generous fashion," H.R. Rpt. 72, that INS operate an extensive education and outreach program, that aliens be buffered from INS by extensive confidentiality protections and by QDEs, and that those who came forward to apply be given interim stays of deportation and work permits based on the presentation of prima facie claims to eligibility. *Bowen* concluded: "All of the class members who had failed to

54 See generally De Ford, *Pittston Coal Group v. Sebben: What Is Its Significance, If Any, for Social Security Class Actions*, 22 Clearinghouse Review 1407, 1409-10 (1989).

comply with the time limitation were entitled to believe that their Government's determination of *ineligibility was the considered judgment of an agency faithfully executing the laws ...*" *Id.* at 480 (Emph. added). So too here, and doubly so.[55]

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55 Due process is another basis for relief in this case. See *McNary*, 895 (alien's interest in legalization "plainly sufficient to mandate constitutionally fair procedures in the [legalization] application process"); *Agosto v. INS*, 436 U.S. 748, 753 (1985) (deportation, the likely result of denial of a meaningful opportunity to apply for legalization, "may result in loss of both property and life; or all that makes life worth living"); *In re Thornburgh*, 869 F.2d 1504, 1514-16 (D.C. Cir. 1989). As recently explained by this Court, the loss of a reasonable opportunity to apply for legalization involves loss of the right to earn a livelihood for applicants and their family members, many of whom are U.S. citizens, and it exposes individuals to potential deportation and separation from their families. *McNary* 895. See further, *Moser v. United States*, 341 U.S. 41 (1951); *United States v Pennsylvania Ind. Chem. Corp.*, 411 U.S. 655 (1973). While due process was pleaded below, CRC 72, p. 33, these claims were not reached. Therefore, if the Court holds that the district courts were statutorily precluded from granting relief, the cases should be remanded to the district courts so that they may rule on these claims in the first instance.

B. *Pangilinan* In No Way Bars Injunctive Relief in These Cases

INS' argument that the district court orders tolling the application deadline contravene *INS v. Pangilinan*, 486 U.S. 875 (1988), was rejected by the courts below, as well as the Second Circuit in *Perales v. Thornburgh*, at *811-14*. It founders for three key reasons, which are not limited, as INS claims, to the argument that "*Pangilinan* should be strictly limited to cases in which the court's order directly requires naturalization." Pet. Bf. 30. First, it ignores the significant doctrinal change in this Court's equitable tolling jurisprudence articulated in *Irwin* two years after *Pangilinan*. Second, it ignores the basic difference between the unique role that courts play in the naturalization process, which was determinative in *Pangilinan*. And, third, it ignores the conclusion in *Pangilinan* that there was no statutory or constitutional violation to remedy.

In essence, INS argues that *Pangilinan* allows it to act above the law--that it could have implemented legalization in a manner which violated *every* provision of the statute, every jot and tittle, and thwarted *every* eligible applicant from applying. Then, the courts would be totally impotent if they could not have acted before May 4, 1988. In short, for INS, justice is a race. However, *Pangilinan* does not countenance such a radical constriction of Article III powers. This Court did not, in *Pangilinan*, unanimously jettison hundreds of years of Anglo-American law. It simply determined that traditional equitable powers did not extend to a particular set of forty-year old legal and factual issues, where Congress' intent had been fulfilled, where no statutory *or* constitutional violation occurred, and where the district court was acting as a special tribunal, a "naturalization court."

Pangilinan reviewed a district court order that granted naturalization to aliens who had applied after Congress' express time limit. This Court explained that the "more fundamental" problem with the order was that "the power to make someone a

citizen...has *not* been conferred upon the federal courts *like [the power to order] mandamus or injunction*...[except] in strict compliance with the terms of the authorizing statute." 486 U.S. at 883-84 (emph. added). In short, a court exercising naturalization powers acts under an express Congressional delegation, more like an administrative agency that can act only strictly within its delegated powers. It is this context that *Pangilinan* said: "more fundamentally ... the power to make someone a citizen...has not been conferred upon the federal courts, like mandamus or injunction as one of their generally applicable powers." *Id.* 884.

Pangilinan amplified on this point in several different ways: "'A person may be naturalized...in the manner...prescribed [in the INA], and not otherwise,'" *Id.*, quoting § 1421(d); "'Once it has been determined that a person does not qualify for citizenship ... the district court has no discretion to...grant citizenship,'" 486 U.S. at 884 (citation omitted); "Neither by application of the doctrine of estoppel ... nor by any other means does a court have the power to confer citizenship in violation of [statutory] limitations." *Id.* See further, 4 Gordon & Mailman, *Imm. Law & Proc.* § 94.02[1], p. 94-24.

A district court does not act *qua district court* when it exercises naturalization powers. Rather, it is acting as a special "naturalization court," which was defined in § 1101(a)(24) to include, but not be limited to, district courts.[56] From 1790 to 1990, "naturalization courts" *also* included state or territorial courts. 4 Gordon & Mailman, *supra*, § 94.02[1], p. 94-24; see

[56] Congress provided in P.L. 101-649, § 401, 1990 Stat. 4978, 5038, amending 8 U.S.C. § 1421, for the cessation of judicial naturalization so this discussion is historical, not descriptive of the contemporary role. Now, it is an unalloyed executive function. "[T]he Attorney General now has the power to make decisions on naturalization applications; recommendations [to a naturalization court] are a thing of the past." 4 Gordon & Mailman, *supra*, § 94.01[2][f], p. 94-12. Now, the federal courts serve in a pure judicial capacity, judicial reviewing the Attorney General's decisions. *Id.* See generally, *id.* § 94.01[1][f], pp. 94-11 to 94-14.

further, *id.*, pp. 94-20 to 94-26. Indeed, the hybrid nature of a naturalization court is clear from the fact that from 1906 to 1990, "naturalization was the *joint* responsibility of the courts and administrative officers ..." *Id.* p. 94-18 (emph. added). This unusual blending of judicial and executive powers reinforces the characterization of such courts as a quasi-administrative agencies, with delegated powers strictly circumscribed.

C. Denial Of Relief In This Case Would Frustrate The Public Policy Established By Congress In IRCA

In *Pangilinan* , certiorari was granted specifically to resolve the conflict between the Second and Ninth Circuit's construction of the 1940 Nationality Act. 486 U.S. at 877.[57] This Court accepted the Second Circuit's view of INS' statutory arguments. *Id.* at 878. The decision centered on the conclusion that Congress' purposes underlying the Act had been fully achieved through the Attorney General's procedures adopted to implement the Act.[58] Therefore, there simply was no statutory violation to

[57] The only conflict between those courts was whether the Attorney General had violated the terms of the Act by not having a full-time representative on site in the Philippines to accept naturalization applications. The Ninth Circuit held that the Act required a naturalization officer in the Philippines during the middle nine months of the 18-month statutory application period. *Pangilinan v. INS*, 796 F.2d 1091, 1097-1101 (9th Cir. 1986). The second circuit flatly disagreed. *Olegario v. United States*, 629 F.2d 204, 223-28 (2d Cir. 1980). The briefing in *Pangilinan* similarly focused on whether the Attorney general had violated the intent of Congress. See Reply Memo. for INS at 2-3; Brief For The Petitioner at 30-41, Argument B.1 ("The Attorney General's Revocation of the Vice Consul's Naturalization Authority Did Not Violate the 1940 Act"); Reply Br. for the Pet. at 4-6.

[58] Thus, although a representative was not present in the Philippines throughout the entire 17-month period, a consular official was present for eight months, including the most critical five months at the close of the statutory applications period. *Id.* at 885. The Court held that the latitude provided in the 1940 Act to process petitions by officers traveling post to

remedy. The contrast here could not be greater. Here, INS *concededly* violated IRCA. Here, the legislative purpose is plainly frustrated by denying relief to persons that Congress wanted legalized.

In *Pangilinan* this Court did *not* analyze whether the deadline for filing a naturalization petition was either substantive, jurisdictional, or in the nature of a statute of limitations.[59]

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post, together with thousands of Filipinos' success in attaining naturalization despite the removal of consular authority, fully satisfied the requirements imposed by Congress--just as the Second Circuit had concluded and as INS had argued at length in its briefs in this Court. The Court pointedly noted that "[t]he approximately 7-month presence of a naturalization officer in the Philippines . . . compared favorably with the mere periodic presence of such officers elsewhere in the world." *Id.* at 886.

[59] As we discussed at p. 37, *supra*, the Court does not focus on whether a statute is substantive or procedural. *Glus v. Brooklyn East. Dist. Term.*, *supra*, explicitly held that even a "substantive" limitations statute could be tolled. *Glus* held that earlier Supreme Court decisions to the effect that equity is of no help when "[t]he liability and the remedy are created by the same statute, and the limitations of the remedy are therefore to be treated as limitations of right" -- the argument INS makes here --was "dicta and *is neither binding nor persuasive*." *Id.* 235 and n. 11 (emph. added).

Burnett v. New York Cent. R.R. Co., 380 U.S. 424 (1963), dealt with a deadline for filing actions under the Federal Employers Liability Act (FELA). The court of appeals concluded that the limitation was contained in the same Act which creates the right, it was "substantive" and not "procedural" and therefore could not be tolled. *Id.* 425. As INS argues here, the court of appeal in *Burnett* reasoned that "[f]ailure to bring the action within the time prescribed extinguished the cause of action." *Id.* 426. This Court disagreed:

> The basic question...is one 'of legislative intent whether the right shall be enforceable...after the prescribed time....'Classification of such a provision as 'substantive' rather than 'procedural' does not determine whether or under what circumstances the...period may be extended....[Instead, the] basic inquiry is whether *congressional purpose is effectuated by tolling the statute* of limitations in given circumstances.

Id. 426-27 (emph. added). See also *Badarraco v. CIR*, 464 U.S. 386, 388 (1984) (same); *Zipes v. Trans World Airlines*, 455 U.S. 385

Rather, as we suggest, the Court focused on Congressional intent; in that case compliance with the deadline was "enforcing the public policy established by Congress." *Id.* 883. Taking precisely this perspective, *Pangilinan* repeatedly emphasized that the Congressional purposes underlying the 1940 Act -- which it stated "could not be more manifest," *id.* 884 -- had been fully achieved through the procedures established by the Attorney General to implement the Act. *Id.* 884-85.[60]

Here, by contrast, the purpose of the 12-month application period was designed to insure that the amnesty program could be operated efficiently and effectively within the limited budget appropriated for its implementation, supplemented by the fees charged to applicants to cover the costs of the program, and ended relatively quickly. The basic purposes were to radically reduce the number of undocumented aliens in the U. S., both to end the negative societal consequences of their underground lives and employment, and to sharply refocus future enforcement along the borders. These purpose would be completely frustrated if INS' interpretation of § 1255a(f) were adopted.

In fact, one can barely imagine anything that would more frustrate these purposes than a decision in INS' favor, a decision which would result in as many as 300,000 legalizable aliens, all "continuous" residents since at least 1981, few likely ever to abandon their residence, reverting to undocumented status, outside of Government control, evading apprehension, working for employers willing to violate IRCA's employer sanctions

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(1982); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 427 (1982); *Honda v. Clark*, 386 U.S. 484, 501 (1967).

[60] This Court's evaluation of Congress's intent in *Pangilinan* was further underscored by Congress's adoption in 1948 of "a new liberalized citizenship program that excluded Filipino servicemen, and specifically provided that even applications timely filed under the 1940 Act and still pending would be adjudged under the new provisions." *Id.* 884. Thus, Congress, in revisiting the issue, expressly indicated an intent to restrict the naturalization opportunities of Filipino servicemen.

provisions. Adoption of INS' position would add more undocumented aliens to the streets of the nation in one fell swoop than any single action undertaken by any government or alien smuggler in our history. Nothing could be more contrary both to the national interest and to the express purpose of Congress -- other than perhaps opening the border to illegal crossings for several months.[61] If INS had acted properly, the class members today would already be lawful permanent residents.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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61 As noted above, to hold otherwise leads to absurd results Congress could not have and did not contemplate. Under the INS' interpretation of § 1255a and *Pangilinan*, INS could have limited the entire legalization application period to five minutes at midnight on a Sunday evening, without remedial judicial intervention.